No. 92-1196

In The

Supreme Court of the United States

October Term, 1993

WALDEMAR RATZLAF AND LORETTA RATZLAF,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT IN REPLY

Treasury Department regulations, promulgated under 31 U.S.C. § 5313(a), require financial institutions to report currency transactions involving more than $10,000. The form is called a Currency Transaction Report, or "CTR." Section 5324 prohibits structuring currency transactions "for the purpose of evading" the CTR requirement. The petitioners, Waldemar and Loretta Ratzlaf, offer this Court four principal reasons, each independently sufficient, to hold that a bank customer cannot "willfully" violate the law against structuring unless the customer knows that such structuring is prohibited by law. The petitioners support their principal arguments by invoking several presumptions of statutory construction. The respondent's brief does not address many of these points, and those it does address it does not refute. This Court should hold that structuring currency transactions is not criminal unless committed with knowledge of the ban on structuring.

First, unless "willfulness" under 31 U.S.C. § 5322 – which converts a mere regulatory violation of 31 U.S.C. § 5324 into a serious felony – is construed to require knowledge of the law governing the defendant's conduct,[1] the element adds nothing to the requirements of

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[1] In its brief, the respondent occasionally lapses into confusion of this contention with the rather different proposition, which we do not advance, that the defendant to be guilty must know "that the United States Code (or any other law) made that conduct a crime." Resp. Br. at 26 n.18. Nowhere in our brief do we suggest that the defendant must know either where the law is codified, or that it is a criminal law.

the underlying statute. Pet. Br. 12-14. The respondent's brief concedes that this is so, Resp. Br. 17, 38-39, without even attempting to demonstrate, as required, that the petitioners' construction is not "possible." See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). For this reason alone, the judgment below can and should be reversed.

Second, the petitioners' interpretation of the statute is necessary to avoid the word "willfully," as used in section 5322, being assigned different meanings when attached to various different violations of Subchapter II of Chapter 53 of the Bank Secrecy Act of 1970. First, the respondent asserts that section 5322 "establishes a single standard of criminal liability – willfulness." Resp. Br. 38. But in fact the respondent proposes a construction under which that same word, taken from the same section, is required to mean two or more different things when incorporated by reference into each of several different provisions – "for the purpose of evading [the bank's] reporting requirement" as applied to a bank customer's section 5324 violation, but "intentionally violating one's own, known legal obligations" as applied to section 5313 violations by a financial institution or section 5316 violations by an international traveler. *See* Resp. Br. 40-42 (ignoring our anticipation and refutation of this argument; *see* Pet. Br. 30 n.22). The only definition of "willfully," as used in section 5322, that allows it to be employed consistently in all its applications is "with knowledge that one's acts are contrary to law."

Moreover, that is the definition that the courts had consistently applied to willfulness under section 5322

when Congress adopted that section as the criminal provision for the newly enacted section 5324 in 1986. Pet. Br. 14-18. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). This reason alone is also enough to require reversal.

The petitioners' brief demonstrates additionally that criminal enforcement of section 5324 fits into a hierarchy of interrelated statutory remedies for improper dealings in cash, including forfeiture and money laundering provisions. Pet. Br. 40-44. Interpretation of these provisions *in pari materia*, see *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990), and the position of 5322/5324 prosecutions in this statutory structure require adoption of a "knowledge of the law" *mens rea*. The respondent does not address this argument, *cf.* Resp. Br. 40, although it, too, would justify a ruling in petitioners' favor. See, *e.g.*, *Spies v. United States*, 317 U.S. 492, 495-97 (1943).

The petitioners buttress these four language- and structure-based statutory construction arguments with three strong presumptions. First, the petitioners rely on the notion that Congress does not ordinarily intend to create serious felony offenses that lack any element of morally blameworthy behavior. Pet. Br. 18-32. Second, the petitioners' construction of the statute avoids certain constitutional Due Process questions that would otherwise arise. Pet. Br. 32-33 (discussing validity of offense without true *scienter*, and vagueness). Finally, the rule of lenity

supports the petitioners' argument. Pet. Br. 47-48. The respondent's answers to these points amount to *ipse dixit*.

The respondent appears to concede that an offense requiring "willfulness" should be construed as calling for proof of blameworthiness (respondent calls this a "bad purpose" or "purpose to do wrong"), and that this element must sometimes be satisfied by proof of an intentional violation of a known legal duty. Resp. Br. 22-25. The respondent contends that a "bad purpose" is supplied here by section 5324's "purpose of evading the reporting requirements" imposed on banks by section 5313(a). Its argument in support of this notion depends on describing the "purpose of evading" element as if it required a showing by the prosecution of the defendant's employment of some "artifice" or "deceptive practices." Resp. Br. 27; see also *id.* at 41 ("evasion or deceit").[2] But

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[2] Elsewhere in its brief, however, the respondent retreats from this position, perhaps in order not to be seen as abandoning the Treasury Department's far broader regulatory definition, which does not require any true "evasion." Resp. Br. 29-30. But it does not explain how deliberately keeping out of government files information in which an agency has a "regulatory interest," Resp. Br. 29 n.20, but to which it has no legal entitlement, can legally be considered "bad." After all, the IRS has a "regulatory interest" in knowing everything about Americans' financial affairs; surely, the government is not suggesting that this Court hold there is a "duty" to tell the IRS any more than what the law requires to be revealed. The Treasury Department "direct[ion]" that banks report "suspicious transactions," invoked by the respondent, *id.*, is not mandatory and does not expand the bank's obligations under section 5313 or its implementing regulations. *See* Pet. Br. 29 n.20 (providing permanent C.F.R. citation of same advisory "BSA Treasury Ruling" for which respondent's footnote gives a Federal Register reference).

under neither the Treasury regulation's definition of "structure (structuring)," 31 C.F.R. § 103.11(p), Pet. Stat. App. 13-14, nor under the trial court's jury instructions here can any such limitation be found. The judgment cannot be affirmed on a theory not relied upon at trial. See *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807, 114 L.Ed.2d 307, 324 n.8 (1991); accord, *id.* at 336 (Stevens, J., dissenting). See also, *e.g.*, *Chiarella v. United States*, 445 U.S. 222, 235-36 (1980); *Dunn v. United States*, 442 U.S. 100, 106 (1979).[3]

Rather, as extensively discussed in the petitioners' brief, the concept of "evasion" in section 5324 apparently is viewed by the government in practice (as contrasted with the posturing of the respondent's brief) as meaning no more than "avoidance," and the concept of "structuring" as meaning (like "willfully," in the respondent's view) nothing at all. While we argue that "evading" should be understood more narrowly – that is, in its usual legal sense, Pet. Br. 37-40 – if "evading" means only "avoiding" (or "frustrat[ing]," as the trial court put it to the jury here) then the respondent's brief completely fails to explain how this constitutes any sort of "bad purpose" at all. *See also* note 2 *ante*.[4]

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[3] If this Court is inclined to adopt the respondent's new construction of "purpose to evade," requiring an element of artifice or deceit – which is similar to one point that we have advanced, *see* Pet. Br. 37-40 – then the regulation must be disapproved, and the judgment of conviction must be reversed and the case remanded for a new trial on such instructions.

[4] This case, in its present posture, is not about the sufficiency of the evidence but rather about the proper definition of the elements of the offense. Nor does the respondent seem to

The respondent's brief also dismisses too lightly the constitutional issues that can be avoided by adopting the petitioners' position. Resp. Br. 43.[5] Because, as just elaborated, the anti-structuring law, even as the government now would construe it, contains no genuine element of blameworthiness (or "bad purpose"), but only an intent to avoid implicating certain governmental regulations, the question does arise whether the due process clause permits severe punishment of such conduct (even if engaged in "knowingly"). See *Posters 'n' Things, Ltd. v. United States*, No. 92-903, in which just that sort of issue is presented this Term. The kind of *scienter* that we suggest

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argue that error in the definition of the *mens rea* element could somehow have been harmless in this case. Thus, it is puzzling to contemplate what point the respondent's brief is trying to make when it strays into a discussion of whether the Ratzlafs themselves "were clearly involved in evasion in even the narrowest sense of the term." Resp. Br. 31. (The same comment would apply to the respondent's immaterial elaboration of the "facts" of the case (*id.* at 5-7), which focuses on the motive evidence and "background" adduced at trial. The issue here is not whether the petitioners intended to keep information of their cash transactions away from the IRS; that is undisputed. The question is whether their ignorance that this might be unlawful protects them from conviction under the statute at issue here.) In any event, the "instances" referred to by the government as demonstrating "a garden variety case of evasion" are not the transactions for which the petitioners were charged and convicted. In the two instances underlying these convictions, no information was withheld from the bank. *See* Pet. Br. 5-6; Resp. Br. 8-9.

[5] The respondent seeks to avoid application of the rule of lenity by asserting that there is no ambiguity in this statute's use of the words "willfully violating this subchapter." Resp. Br. 42-43. The fundamental ambiguity in this phrase, out of which this case arises, is identified in Pet. Br. at 11.

is necessary to satisfy due process, outside the realm of inherently dangerous or highly regulated activities, is knowledge of the facts that make the conduct "blameworthy" (or "bad"), not merely knowledge of *any* facts. *Cf. Staples v. United States*, No. 92-1441 (also presenting such an issue of statutory construction for decision this Term).

The respondent relies heavily on an extensive but attenuated reading of the legislative history of the 1986 Act to support its analysis. Resp. Br. 32-35. As we already have shown, Pet. Br. 44-47, those materials do not discuss the incorporation of 31 U.S.C. § 5322 as the criminal enforcement provision for the new anti-structuring law. Thus, that history falls far short of demonstrating a Congressional intent to reject that section's settled construction and instead leave the term "willfully" without any significance despite its role in elevating a regulatory violation into a felony.

Finally, the respondent turns to "subsequent legislative history" to bolster its argument, relying on a line in a committee report on a 1991 bill containing a provision that was ultimately included in the 1992 Annunzio-Wylie Anti-Money Laundering Act. Resp. Br. 36-37. This Court has never given such arguments much weight. See, *e.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990). The 1992 amendment had nothing to do with Congressional consideration or reconsideration of the *mens rea* element of this or any other offense, but merely added a new subsection to section 5324. The report which the respondent quotes is thus that of a different committee of (one House of) a different Congress, concerning a different bill from that enacted in 1970 or in 1986 (or even in 1992, for that matter).

No Member of Congress, much less the Congress as a whole, was ever called upon to vote on whether that part of the report was accurate, since it did not interpret any part of the law then proposed to be enacted. The respondent's reliance on the line quoted from the 1991 report is no more than an attempt to "smuggle into judicial consideration," *Finkelstein, supra,* 496 U.S. at 631 (Scalia, J., concurring), under the guise of "legislative history," the government's litigation position on the very issue now before this Court. "Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote." *Id.* at 632. The Court should therefore dismiss entirely the respondent's argument attempting to interpret section 5322, as enacted in 1970 and adopted in 1986, on the basis of a committee report filed in 1991 with respect to a proposed amendment to section 5324.

A few simple, not-so-hypothetical cases[6] illustrates the unfairness and implausibility of the government's theory. Imagine a person whose legitimate business generates substantial cash receipts, and who declares every penny, every year, on a properly filed income tax return. This person, however, knows of the CTR requirement, and knows that the IRS takes a "regulatory interest," Resp. Br. 29 n.20, in cash transactions at financial institutions involving more than $10,000, because the agency believes them to be suspicious and to suggest fertile ground to plow for evidence of tax evasion at least, if not

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[6] See, for example, the actual facts of *United States v. Aversa,* 984 F.2d 493 (1st Cir. 1993) (in banc), or of *United States v. Shirk,* 981 F.2d 1382 (3d Cir. 1992), *cert. pending,* No. 92-1841.

of other illegal activities. Our subject has no desire to deal with unnecessary IRS audits or to fend off the inquiries of suspicious government agents. A business decision is therefore made, precisely for the purpose of seeing that no CTR is ever filed, that the business will send cash to the bank whenever the till or safe accumulates nearly $10,000, even if this means increasing the number of trips to the bank each week, or even each day. Another business person, for the same reason, decides to open the company's operating account in one bank and the payroll account in another. Further assume that neither knows there is a law prohibiting "structuring."

Or, to recap the pertinent facts of the petitioners' case (Counts Four and Five), the bank customer, knowing generally of the CTR requirement and wishing no report to be made, asks a bank official whether a report needs to be filed if a single sum of currency is used to purchase a cashier's check for more than $10,000. Told that it does, the customer asks if this is so when two checks of less than $10,000 each are purchased by two customers from that same single sum of currency. On the banker's (mistaken) assurance that no report need then be filed, and not knowing of the ban on structuring, the customer and her companion buy two cashier's checks for $9500 each.

The respondent's construction of 31 U.S.C. §§ 5322 and 5324 calls each of these actions "evasion" and declares all of them to have a criminally "bad purpose." Must Congress be deemed to have intended such conduct, engaged in for this reason, to be punished as a serious felony offense? The analyses of the unanimous, *in banc* First Circuit in *Aversa, supra,* of Judge Kozinski in *Caldwell, see* Pet. Br. 27-28, and of this Court in *United*

States v. Isham, 17 Wall. (84 U.S.) 496 (1873) (*see* Pet. Br. 37-39), compel the answer No. The judgment of the Ninth Circuit must be reversed.

CONCLUSION

For each of the foregoing reasons, and for the reasons more fully elaborated in their opening brief, petitioners Waldemar and Loretta Ratzlaf pray that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit affirming their convictions and sentences, and direct the court of appeals to remand for a new trial.

Respectfully submitted,

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September 22, 1993.